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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ASKLEPIOS HEALTH LLC, a Washington
limited liability company; MERIDIAN PARK
RADIATION ONCOLOGY CENTER, INC.,
an Oregon corporation; and IVAN PAVLOV,
an individual,

Plaintiffs,

v.

RADIATION ONCOLOGY SPECIALISTS,
PC, an Oregon professional corporation;
NORMAN WILLIS MD, an individual;
ROBERT MILLER, an individual; TANA
MILLER, an individual; and MARTIN FUSS
MD, an individual.

Defendants.

Case No. 3:18-CV-1177-PK

**DEFENDANT FUSS’
MEMORANDUM IN
SUPPORT OF MOTION TO
DISMISS**

MEMORANDUM OF LAW

Plaintiffs’ Third Amended Complaint seeks the federal district court’s Declaration that the federal district court has subject matter jurisdiction to determine the legality of certain agreements among the parties. Count I asks the court to declare that it has “original jurisdiction” to determine the legality of the various agreements. Count II asks the court to declare that the Restricted Unit Grant Agreement (“RUGA”) between defendant Fuss and plaintiff Asklepios Health LLC violates the federal Anti-Kickback Statute [42 USC § 1320a-7b] and consequently

1 the federal False Claims Act [31 USC § 3729 *et seq.*] and therefore cannot be enforced because
2 they are (allegedly) illegal. Counts III, IV and V ask the court for similar declarations of
3 illegality regarding other agreements among the several parties, including Fuss. This Motion and
4 Memorandum address only Count I and Count II of the Third Amended Complaint as they relate
5 to the RUGA.

6 Fuss joins all other named defendants in moving for dismissal of Counts III, IV and V as
7 pled in a separate Motion and Memorandum. This Memorandum is filed separately because
8 Fuss is represented by this firm only with respect to matters relating to his Operating Agreement
9 and RUGA with Asklepios Health LLC. Dunn Carney LLP represents Fuss with respect to
10 matters relating to the Agreement for Radiation Oncology Services (aka the “Services
11 Agreement”) between MPROC Inc and Radiation Oncology Services P.C. (“ROSPC”) in which
12 Fuss holds a share.

13 Plaintiffs allege in their Third Amended Complaint at ¶ 3 that this court has “original”
14 subject matter jurisdiction over its claim that the RUGA is illegal, and therefore unenforceable,
15 pursuant to 28 § USC 1313, which provides:

16 *The district courts shall have original jurisdiction of all civil actions arising*
17 *under the Constitution, laws, or treaties of the United States.*

18 The RUGA (Benke Declaration Exhibit 1) provides in relevant part:

19 *1. Grant of Units. The Company hereby grants to Fuss and Fuss hereby accepts*
20 *the number of the Company’s Membership units set forth on the signature page of*
21 *this Grant (the “Units”) pursuant to the Company’s Limited Liability Company*
22 *Operating Agreement dated effective June 29, 2015 (the “Operating*
23 *Agreement”). Capitalized but undefined terms have the meanings set forth in the*
24 *Operating Agreement.*

25 * * * * *

1 5. Restriction on Transfer and Additional Terms. *In addition to the terms hereof,*
2 *all Units are subject to the transfer restrictions imposed by the Operating*
3 *Agreement, and all rights and obligations of the members not set forth in this*
4 *Grant are governed by the terms of the Operating Agreement.*

5 * * * * *

6 6. General Provisions. *(a) This Grant shall be governed by the laws of the State*
7 *of Washington. This Grant (and the attached Operating Agreement) represents*
8 *the entire agreement between the parties with respect to the receipt of Units by*
9 *Fuss and may only be modified or amended in writing signed by both parties.*

10 The Operating Agreement (Benke Declaration Exhibit 2) provides in part:

11 13.03 Arbitration. *Any dispute among the Unit Holders or among the Unit*
12 *Holders and the LLC concerning this Operating Agreement shall be settled by*
13 *arbitration before a single arbitrator, using the rules of commercial arbitration of*
14 *the Arbitration Service of Portland. Arbitration shall occur in Vancouver,*
15 *Washington or Portland, Oregon. The parties shall be entitled to conduct*
16 *discovery in accordance with the Federal Rules of Civil Procedure, subject to*
17 *limitation by the arbitrator to secure just and efficient resolution of the dispute. If*
18 *the amount in controversy exceeds \$10,000.00 the arbitrator's decision shall*
19 *include a statement specifying in reasonable detail the basis for and computation*
20 *of the amount of the award, if any. A party substantially prevailing in the*
21 *arbitration shall also be entitled to recover such amount for its costs and*
22 *attorneys' fees incurred in connection with the arbitration as shall be determined*
23 *by the arbitrator. Judgment upon the arbitration award may be entered in any*
24 *court having jurisdiction. Nothing herein, however shall prevent a Unit Holder*
25 *from resort to a court of competent jurisdiction in those instances where*

1 *injunctive relief may be appropriate.*

2
3 **The federal district court does not have original subject matter jurisdiction over plaintiff's**
4 **claim that the RUGA is an illegal contract.**

5 Plaintiffs allege that their claims “arise under” the Declaratory Judgment Act [28 USC §§
6 2201 and 2202], the federal Anti-Kickback Statute [42 USC § 1320a-7b] and the False Claims
7 Act [31 USC § 3729]. Plaintiffs allege (at ¶ 56 of their Third Amended Complaint) that “There
8 is a justiciable controversy as to whether this matter may only be decided by a Federal Court of
9 proper jurisdiction since the violations set forth herein are violations of a Federal statute, *inter*
10 *alia*, 42 U.S.C. § 1320a-7b(b).”

11 The Declaratory Judgment Act is not an independent grant of federal subject-matter
12 jurisdiction, so jurisdiction depends upon the nature of the anticipated claims. Samuel C.
13 Johnson 1988 Trust v. Bayfield County, 520 F.3d 822 (7th Cir. 2008).

14 The Supreme Court has explained that the “vast bulk” of suits arise under federal law
15 “when federal law creates the cause of action asserted.” Gunn v. Minton, 133 S. Ct. 1059, 1064
16 (2013).

17 The Anti-Kickback Statute (“AKS”) does not provide a private right of action. Ameritox,
18 Ltd v. Millennium Labs., Inc., 803 F.3d 518 (11th Cir., 2015).

19 The False Claims Act (“FCA”) provides for a private right of action in the form of a *qui*
20 *tam* action brought in accordance with 31 USC § 3730(b). The action must be brought in the
21 name of the Government, which plaintiffs’ action is not.

22 Exceptions to the rule that federal law must create the cause of action are “extremely
23 rare.” Gunn. However, the Court has “identified a ‘special and small category’ of cases” in
24 which *state law* creates the cause of action but arising under jurisdiction still exists. Id. A case
25 fits within this small category when “a federal issue is: (1) necessarily raised, (2) actually

1 disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the
2 federal-state balance approved by Congress.” Id. at 1065. When these four conditions are met,
3 “jurisdiction is proper because there is a ‘serious federal interest in claiming the advantages
4 thought to be inherent in a federal forum,’ which can be vindicated without disrupting
5 Congress’s intended division of labor between state and federal courts.” Id. (quoting Grable &
6 Sons Metal Products, Inc. v. Darue Engineering & Mfg., 545 U.S. 308, 313-14 (2005)).

7 The Supreme Court has explained that “[n]eedless decisions of state law should be
8 avoided both as a matter of comity and to promote justice between the parties, by procuring for
9 them a surer-footed reading of applicable law.” United Mine Workers of America v. Gibbs, 383
10 U.S. 715, 726 (1966).

11 In DeBartolo v. Healthsouth Corporation, 569 F.3d 736 (7th Cir., 2009) plaintiffs initiated
12 an action in federal court for declaratory and injunctive relief, arguing that their contract with
13 defendant could not be reconciled with regulations enacted pursuant to the AKS. DeBartolo
14 asked the district court to declare certain amendments to the parties’ agreement void. DeBartolo
15 cited 28 USC § 1331 as a basis for subject matter jurisdiction, asserting that his lawsuit poses “a
16 substantial federal question because the court is required to rule on the legality of an agreement
17 that, as applied by the Defendants, violates the federal Anti-Kickback Statute.” Defendants did
18 not dispute the district court’s jurisdiction, but the district court indicated that it was “skeptical
19 whether it even possessed subject matter jurisdiction because, in the court’s view, the lawsuit
20 essentially is a state-law contract dispute between parties who are mostly citizens of Illinois.”
21 DeBartolo, 569 F.3d at 739. On review, the Seventh Circuit held that the litigation was “simply
22 a state-law contract dispute.” Importantly, the court of appeals observed that DeBartolo had
23 invoked the AKS as a defense to his contracting partner’s anticipated state-law contract action to
24 enforce plaintiffs’ rights under the partnership agreement (the same posture in which the parties
25 to this litigation find themselves) and that such a defense cannot be a source of federal question

1 jurisdiction unless the statutory defense raises “a pure question of federal law of the caliber at
2 stake in Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg., 545 U.S. 308, 313-14
3 (2005).” The Seventh Circuit stated plainly in its decision “After all, a federal defense does not
4 establish federal-question jurisdiction”, citing Merrell Dow Pharm Inc. v. Thompson, 478 US
5 804 (1986) [“We conclude that a complaint alleging a violation of a federal statute as an element
6 of a state cause of action, when Congress has determined that there should be no private, federal
7 cause of action for the violation, does not state a claim ‘arising under the Constitution, laws, or
8 treaties of the United States.’ 28 U.S.C. § 1331.”]

9 The RUGA at issue is (by its own terms) governed by the laws of the State of
10 Washington. Washington law regarding illegality of contracts and the doctrine of severability is
11 set out at Brougham v. Swarva, 34 Wn.App. 68, 661 P.2d 138 (1983):

12 *[I]f the promise sued upon is related to an illegal transaction, but is not*
13 *illegal in and of itself, recovery should not be denied, notwithstanding the related*
14 *illegal transaction, if the aid of the illegal transaction is not relied upon or*
15 *required, or if the promise sued upon is remote from or collateral to the illegal*
16 *transaction, or is supported by independent consideration.*

17 Plaintiffs challenge the legality of the Restricted Unit Grant Agreement (“RUGA”) separate and
18 apart from the Operating Agreement to which it refers. Plaintiffs allege at ¶ 43 of their Third
19 Amended Complaint:

20 *For example, the RUGA grants a future 20% ownership interest to a physician*
21 *who refers to MPROC, and requires that, for that ownership interest to vest, the*
22 *referring physician must accumulate sufficient credit (allocated to the physician*
23 *using the formula “MPROC net revenues – distributions”) to repay Asklepios’*
24 *investment in MPROC. * * **

25 Plaintiffs characterization of the RUGA terms is entirely contrary to the actual terms of the

1 Operating Agreement and RUGA. Aside from the reference to physician “referrals” to MPROC
2 (the fact of which Fuss adamantly denies), the suggestion that the RUGA is a “grant” of a
3 “future...interest” is entirely false.

4 The parties’ Operating Agreement granted to Dr. Fuss 200,000 Class A Units in
5 Asklepios, just as it granted 800,000 Class A Units and 1,500,000 Class B “preferred” Units in
6 Asklepios to Ivan Pavlov. The Operating Agreement provides that “Fuss’ units will vest per the
7 Vesting Schedule in Exhibit A to the Restricted Unit Grant Agreement.” The RUGA repeats the
8 grant of units to Fuss (e.g., “The Company hereby grants to Fuss...”) and then establishes terms
9 by which Fuss’ units may be “forfeited” – generally, in the event of Fuss’ “failure to perform the
10 services requested by the Company” before Ivan Pavlov’s “loan” to Asklepios is repaid (subject
11 to a five year limit).¹

12 Whether or not the “RUGA” in its entirety or in part violates the AKS, the reviewing
13 court must still apply Washington law to determine whether the 20% ownership interest granted
14 to Fuss by terms of the Operating Agreement is enforceable. Plaintiffs have sought refuge in the
15 federal district court because the arbitrator’s May 11, 2018 decision (Benke Declaration Exhibit
16 3) foretells an unfavorable result for them.

17 Respondents in the arbitration (plaintiffs in this action) maintained that because MPROC
18 Inc had terminated its Services Agreement with ROSPC that Dr. Fuss could no longer “perform
19 the services requested by the Company” and that Fuss’ 20% share in Asklepios was thereby
20 forfeited under terms of the RUGA. The arbitrator disagreed, stating in his decision:

21 *Mr. Pavlov may not create a circumstance (terminating the services agreement)*
22 *and then say Dr. Fuss failed to comply with another agreement by not providing*
23 *services to MPROC, Inc.*

¹ “The Company” being Asklepios Health LLC, not MPROC Inc as plaintiffs’ allegations suggest.

1 The arbitrator then held that Pavlov had breached his duty of good faith and fair dealing toward
2 Fuss, and ruled:

3 *As to the remedy, because Mr. Pavlov made it impossible for the condition of*
4 *vesting to be completed, I declare that Dr. Fuss' 200,000 Class A Non-Vested*
5 *Units have now vested.*

6 Similarly, if the RUGA is illegal as plaintiffs allege in this federal action, under Washington law
7 its terms are severable – unenforceable – but the underlying grant of 200,000 Class A Units to
8 Fuss in the Operating Agreement (the “promise sued upon” in the words of the Brougham court)
9 should not be denied if supported by independent consideration. Here again the arbitrator’s
10 decision foretells the result, as he stated:

11 *I should add that Dr. Fuss provided substantial service to Asklepios prior to the*
12 *signing of the purchase agreements. Without Dr. Fuss the purchase would never*
13 *have occurred.*

14 (The reference to “the purchase agreements” is a reference to Asklepios’ purchase of MPROC
15 Inc.)
16

17 **The Federal Arbitration Act requires that plaintiffs’ action be stayed or dismissed because**
18 **all claims between the parties are subject to an enforceable arbitration clause.**

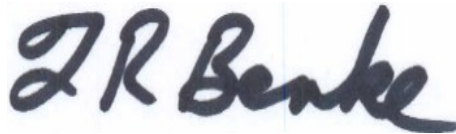
19 The Federal Arbitration Act (9 U.S.C. § 2) provides as follows:

20 *A written provision in any maritime transaction or a contract evidencing a*
21 *transaction involving commerce to settle by arbitration a controversy thereafter*
22 *arising out of such contract or transaction, or the refusal to perform the whole or*
23 *any part thereof, or an agreement in writing to submit to arbitration an existing*
24 *controversy arising out of such a contract, transaction, or refusal, shall be valid,*
25 *irrevocable, and enforceable, save upon such grounds as exist at law or in equity*

1 a federal district court ruling that the agreements are *legal* if the Office of Inspector General ever
2 comes knocking.

3 This court does not have subject matter jurisdiction to hear plaintiffs' claims.
4 Irrespective of the court's lack of jurisdiction, the legality of the RUGA should be determined by
5 J. Amiton, not only because the parties agreed that "any dispute among the Unit Holders or
6 among the Unit Holders and the LLC" would be settled by arbitration, but because J. Amiton has
7 already listened to twelve days of testimony and argument, and has reviewed hundreds of
8 exhibits, bearing on this matter. Under Washington law on illegality of contracts and the
9 doctrine of severability, whether the affirmative defense of illegality is a bar to Fuss' claim to his
10 20% share in Asklepios will depend in part on the standard set out in Brougham and in part on a
11 myriad of factual issues that J. Amiton has already decided or is prepared to decide.

12 Dated: September 5, 2018

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16 THOMAS R. BENKE, OSB 922251

17 503-246-1514, Attorney for Defendant Fuss
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CERTIFICATE OF SERVICE

I hereby certify that on the date shown below, I served a true and correct copy of the foregoing Defendant Fuss' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS to:

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s/ Thomas R. Benke

- ✓ by first class mail, postage prepaid
- ✓ by electronic transmission
- ✓ by the federal judiciary's CM/ECF filing system

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DATED: September 5, 2018